

The Flemish High Council of Environmental Enforcement: the role of an environmental enforcement network in a new coordinated environmental enforcement landscape within the Flemish region, 2009-2014

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26. The Flemish High Council of Environmental Enforcement: the role of an environmental enforcement network in a new coordinated environmental enforcement landscape within the Flemish region, 2009–2014

Michael Faure and An Stas

1. INTRODUCTION

Belgium is a constitutionally complicated country. In addition to the Belgian federal state, competences are equally allocated to communities and regions. This also has a relevance for environmental law and for environmental law enforcement. Those belong primarily to the competences of the three regions, being the Flemish Region, the Brussels Capital Region, and the Walloon Region. In addition, the federal government still holds a number of competences in the area of the environment, such as the determination of product standards and the transit transportation of waste.¹

Until 2009, the enforcement of environmental legislation in the Flemish Region was based on criminal provisions in a variety of fragmented (partially sectorial) decrees. Moreover, this enforcement was mainly based on criminal law enforcement. However, since prosecutors often had other priorities and little capacity to enforce environmental legislation, many environmental violations were dismissed.² Already in 1995 the Ghent

¹ Lavrysen, L., *Handboek Milieurecht*, 2006, pp. 125–157.

² For an empirical analysis showing that prior to 2009 on average more than 65% of environmental violations in the Flemish Region were dismissed, see Faure, M. and Svatikova, K., ‘Enforcement of Environmental Law in the Flemish Region’, *European Energy and Environmental Law Review*, 2010, vol. 19(2), 60–79.

professor Hubert Bocken and his inter-university commission for the reform of environmental policy had proposed new enforcement provisions in a decree on environmental policy.³ However, it took until 2007⁴ for the Flemish legislature to create the decree of 21 December 2007, as a complement to the decree of 5 April 1995 concerning the general provisions on environmental policy, with the title XVI 'Supervision, enforcement, and safety measures', and entered into force on 1 May 2009.⁵ This decree is also known as the 'Environmental Enforcement Decree'.⁶

An important objective of this new regulation was a more effective and harmonised approach to environmental offences.⁷ As a reaction to the already mentioned high dismissal rate of environmental violations by the prosecutors, this new decree brought about a revolutionary change and created the possibility of imposing administrative fines.⁸ The legislation involved an elaborate mechanism whereby some administrative offences can be handled directly by the administrative fining authority; for other violations (still subject to the criminal law), the public prosecutor in principle has to decide whether to follow a criminal prosecution (or other reactions in the criminal procedure) or to submit the case for

³ Explanatory note, Parliamentary papers of the Flemish Parliament, 2006–2007, no 1249, p. 129.

⁴ Faure, M., 'Handhaving van het milieurecht in het Vlaamse Gewest: enkele cijfers'. In: D'Hooge, D., Deketelaere, D. & Draye, A.M. (eds), *Liber Amicorum Marc Boes, Brugge, die Keure*, 2011, pp. 70–78.

⁵ Decree of 21 December 2007 to complement the Decree of 5 April 1995 concerning general provisions on environmental policy with the title XVI 'Toezicht, handhaving en veiligheidsmaatregelen', *Bel. Off. Journal*, 29 February 2008. For an overview on this title in its original version: Heyman, J., 'Is er een Copernicaanse wending op til in het Vlaams milieuhandhavingsbeleid?', *Nullum Crimen*, 2008, pp. 303–326. For a discussion of the Environmental Enforcement Decree and the Environmental Enforcement Act, the penultimate edition: Billiet, C.M., De Smedt, P. and Van Landeghem, H., 'Vlaamse milieuhandhaving nieuwe stijl', *Tijdschrift voor Milieurecht*, 2009, pp. 326–374.

⁶ Explanatory note, Parliamentary papers of the Flemish Parliament, 2006–2007, no 1249, p. 3. For an extensive historical overview and explanation of the drafting of the Decree see: Explanatory note, Parliamentary papers of the Flemish Parliament, 2006–2007, no 1249, pp. 3–19. Heyman J. and Deketelaere, K., 'Het Vlaams decreet betreffende milieuhandhaving'. In: Deketelaere, K. (ed.), *Jaarboek Milieurecht 2007, Milieurechtstandpunten nr. 22*, Bruges, Die Keure, 2008, pp. 221–224.

⁷ Geysels, F., Meeus, R., Vanheule, J. and Hoebe, J., *Handhavingszakboekje Milieu 2009*, p. 6.

⁸ Faure, M., *Bestuurlijke en strafrechtelijke afdoening van milieustrafzaken in het Vlaamse Gewest*. In: Deruyck, F. and Rozie, M. (eds), *Het strafrecht bedreven. Liber Amicorum Alain De Nauw*, 2011, Brugge, die Keure, p. 263.

administrative fining to the administrative authority. That thus made some form of cooperation between the prosecutors (within the different districts and at the courts of appeal) and the administrative fining authority necessary.

A need for cooperation and networking also existed as far as monitoring and enforcement is concerned. Already, prior to the Environmental Enforcement Decree, a large number of departments of the Flemish Government and actors were involved in the environmental enforcement landscape in the Flemish Region.⁹ Following the entry into force of this decree, their numbers merely multiplied. Not only are more departments within the Flemish Government empowered to appoint monitoring agents, at the local level there is even an obligation for the appointment of municipal agents, agents of inter-communal associations, or agents of police districts and provincial agents. Furthermore, both the federal and local police possessed, and currently still possess, competences to enforce the environmental legislative provisions when there is evidence of environmental violations. The mayors and the provincial governors have also been given certain competences for the imposition of administrative measures within the framework of environmental enforcement.¹⁰ Hence, supervision and the competences are spread across a large number of administrative levels and actors.¹¹ Hence, it may be clear that this also created a need for cooperation and networking.

As was just mentioned, before 2009 sanctioning was mainly imposed on the grounds of a criminal offence under the exclusive competences of the public prosecutors' offices. However, studies have shown that most environmental cases were dismissed by the public prosecutors' offices and no further action was taken with respect to the criminal offence.¹² To counteract this fact the Environmental Enforcement Decree created the possibility of administrative sanctioning, by which the administra-

⁹ Populier, P. (ed.), *Heldere handhaving – naar een sterker handhavingsbeleid door betere regelgeving en reglementering*, 2010, Politeia, pp. 19–32.

¹⁰ Decree of 21 December 2007 to complement the Decree of 5 April 1995 concerning general provisions on environmental policy with the title XVI 'Toezicht, handhaving en veiligheidsmaatregelen', *Bel.Gaz.*, 29 February 2008, article 16.1.2, article 16.2.7, article 16.3.1, article 16.3.24, and article 16.4.6.

¹¹ Stas, A., *The Flemish High Council of Environmental Enforcement – a coordinated environmental enforcement policy*. In: INECE, 9th International Conference on Environmental Compliance and Enforcement, Proceedings, 2011, p. 823.

¹² Faure, M., *Handhaving van het milieurecht in het Vlaamse Gewest: enkele cijfers*. In: D'Hooge, D., Deketelaere, D. and Draye, A.M. (eds), *Liber Amicorum Marc Boes, Brugge, die Keure*, 2011, p. 77.

tion within the Flemish Government has the possibility of imposing administrative monetary fines.¹³ Hence, both at the level of monitoring and enforcement as well as concerning the sanctioning a large number of stakeholders were created. That is why the Environmental Enforcement Decree was set to create an institutionalised framework for coordination between those stakeholders within the Flemish High Council of Environmental Enforcement (VHRM).¹⁴ Not only did the large number of different stakeholders make it necessary to establish such a network, also the need for cooperation between these actors and the need to make agreements concerning overlapping and complementary competences led to the creation of this formal collaboration.

The VHRM, created in 2009, had a prior and unofficial predecessor established during the 1990s, called the Prosecution Policy Commission. Within this commission the various environmental enforcement actors tried to delineate and implement a coordinated policy via priority memos.¹⁵ The VHRM can be considered as the more formalised and institutionalised successor to the Prosecution Policy Commission, which only possessed an unofficial status.¹⁶ Whereas the Prosecution Policy Commission was primarily focused on reaching agreements between the regional supervisors and the public prosecutors' offices, the VHRM covers a broader spectrum of environmental enforcement actors.¹⁷ Since the VHRM has been created by a legislative act (a so-called decree), it has a formalised and institutionalised status with concrete competences and tasks.¹⁸ One of its

¹³ Renders, T. and Stas, A., *Het Milieuhandhavingsdecreet: een analyse van de Vlaamse Hoge Raad voor de Milieuhandhaving, het systeem van toezichthouders en de bestuurlijke handhaving deel II*. In: *Tijdschrift Milieu- en Energierecht*, 2011–3, pp. 171–172.

¹⁴ Act of the Government of Flanders of 13 February 2009 concerning the appointment of the members of the Flemish High Council of Environmental Enforcement, mentioned in article 16.2.7 of the Decree of 5 April 1995 concerning general provisions on environmental policy, *Belg. Off. Journal*, 19 March 2009.

¹⁵ Heyman, J. and Deketelaere, K., 'Het Vlaams decreet betreffende milieuhandhaving'. In: Deketelaere, K. (ed.), *Jaarboek Milieurecht 2007, Milieurechtstandpunten nr. 22*, Bruges, Die Keure, 2008, p. 226.

¹⁶ Billiet, C.M., De Smedt, P. and Van Landeghem, H., 'Vlaamse milieuhandhaving nieuwe stijl', *Tijdschrift voor Milieurecht*, 2009, p. 331.

¹⁷ Act of the Government of Flanders of 13 February 2009 concerning the appointment of the members of the Flemish High Council of Environmental Enforcement, mentioned in article 16.2.7 of the Decree of 5 April 1995 concerning general provisions on environmental policy, *Belg. Off. Journal*, 19 March 2009.

¹⁸ Stas, A., 'The Flemish High Council of Environmental Enforcement – a coordinated environmental enforcement policy'. In: *INECE, 9th International*

main tasks is to propose the priorities for the Environmental Enforcement Policy within the Flemish Region. In the following parts, an overview of the structure of the network, the assigned tasks, and its implementation will be offered.

2. THE ORGANISATION OF THE FLEMISH HIGH COUNCIL OF ENVIRONMENTAL ENFORCEMENT

2.1 Structure and General Tasks

In order to assist the Flemish Government within the context of the general coordination and the substantive content complementation of the environmental enforcement policy, the VHRM was created in 2009.¹⁹ The fact that the VHRM has a solid legal basis is a crucial factor for the working of this particular network. Not only does the VHRM work with a fixed annual budget, it also has a permanent secretariat which is responsible for providing the substantive and administrative support. These two aspects are success factors for the accomplishments of the network. Furthermore, individual membership of the plenary meeting is fixed and obligatory, which has advantages and disadvantages. It is not that particular individuals are forced to be members of the VHRM; rather the decree has indicated the stakeholders which will participate in the VHRM. For that particular agency, participation within the VHRM is hence mandatory. But it is up to the particular agency to decide who will represent that agency within the VHRM. The advantage of this obligation is that particular key players (like, for example, the environmental inspectorate) are hence automatically and continuously represented within the VHRM. A disadvantage, however, could be the fact that the network has not been created voluntarily on a 'bottom-up' basis, but has rather been created by decree, 'top down'.

The VHRM has been given the general task of proposing the principles and the priorities of the environmental enforcement policy in a proactive manner. In order to secure and maintain ongoing consensus on these

Conference on Environmental Compliance and Enforcement, Proceedings, 2011, p. 823.

¹⁹ Act of the Government of Flanders of 13 February 2009 concerning the appointment of the members of the Flemish High Council of Environmental Enforcement, mentioned in article 16.2.7 of the Decree of 5 April 1995 concerning general provisions on environmental policy, Belg. Off. Journal, 19 March 2009.

principles and priorities, the VHRM organises in a systematic manner and at regular intervals consultation moments amongst the enforcement actors involved.²⁰ This consultation takes place during plenary meetings and in working groups. Most of the enforcement actors in the Flemish Region with competence for enforcement of environmental law are represented at the plenary meetings. Nearly all of those stakeholders will also be represented at the meetings of the working groups. This, hence, results in a widespread grassroots-level expertise which is undoubtedly absolutely necessary in order to effectively implement an environmental enforcement policy. Conversely, this broad composition (referring to the fact that all stakeholders in environmental enforcement are represented in the VHRM) does not simplify the decision-making process, especially since the VHRM in principle tries to base decisions on a consensus. There are, moreover, large qualitative differences between the various stakeholders and hence the members of the VHRM. Some stakeholders have more than 20 years' experience with environmental enforcement, while others only received their enforcement competences in May 2009 at the moment the Environmental Enforcement Decree entered into force. A policy-oriented, uniformly accepted synchronisation amongst all of the diverse actors is crucial, yet hardly a simple matter.

2.2 Members

The plenary meeting of the VHRM is composed of official and expert members. There are a large number of different stakeholders represented within the VHRM, both from the monitoring as well as from the enforcement and sanctioning levels. Hence, there are *inter alia* representatives from regional supervisors²¹ and enforcement entities, but also representatives of the federal police, local police, the public prosecutors' offices, the cities and municipalities and the provinces. It is important to stress that within the Belgian federal context, some of those stakeholders (like the regional supervisors) belong to the Flemish Region, whereas others (like the public prosecutors, cities, municipalities and provinces) belong to the federal level. In the context of strategic advising, the Social-Economic Council of Flanders and the Environment and Nature Council of Flanders each have a representative member. This broad composition is aimed at

²⁰ Explanatory note, Parliamentary papers of the Flemish Parliament, 2006–2007, no 1249/1, p. 24.

²¹ The Administration of the Government of Flanders counts a total of 13 departments, entities, and agencies with the competence to appoint regional supervisors within their personal organisation's remit.

achieving a wide-ranging scope for the VHRM's activities.²² The members are appointed for five years by the Flemish Government. However, the appointment of the members is renewable. The first composition lasted from May 2009 until May 2014.²³ The second composition started in May 2014.²⁴ The most important benefit of a changing membership is the fact that it creates room for new ideas and new commitments.

The members of the plenary meeting gather on average once a month and take decisions relating to the assignments and tasks of the VHRM, the tasks of the working groups and the orders executed by the permanent secretariat.

2.3 Working Groups

Whereas the plenary meeting of the VHRM works as a decision-making body, the working groups – together with the permanent secretariat – prepare the decisions of the VHRM. The VHRM can establish working groups to examine particular issues or to study problematic areas. These working groups can be ad hoc or permanent. Their working areas and membership have not been consolidated and can be adapted in keeping with the extent to which the needs of the environmental enforcement actors are evolving. The working groups meet in smaller numbers to investigate the problem and formulate a solution, a proposition or a recommendation that is subsequently presented to the plenary meeting. Not only permanent members of the VHRM are invited to participate in the debates and activities, but also collaborators from other enforcement agencies that do not have a member in the plenary meeting are asked to participate in the working groups. This not only enhances the general expertise and knowledge, but also the consensus on, and the scope of the decisions. It was already mentioned above that a large number of stakeholders are represented at the plenary meeting; the same obviously holds for the working groups too. A great variety of enforcement actors

²² Explanatory note, Parliamentary papers of the Flemish Parliament, 2006–2007, no 1249/1, pp. 24–27.

²³ Act of the Government of Flanders of 13 February 2009 concerning the appointment of the members of the Flemish High Council of Environmental Enforcement, mentioned in article 16.2.7 of the Decree of 5 April 1995 concerning general provisions on environmental policy, Belg. Off. Journal, 19 March 2009.

²⁴ Act of the Government of Flanders of 4 April 2014 concerning the appointment of the members of the Flemish High Council of Environmental Enforcement for the period 2014–2019, mentioned in article 16.2.7 of the Decree of 5 April 1995 concerning general provisions on environmental policy, Belg. Off. Journal, 28 April 2014.

are working on the problems investigated in these working groups, all of them with their own traditions and visions on the solutions proposed by the groups and wanting to see these integrated in the results. However, the membership of a working group is voluntary, which enhances the engagement and willingness of the members.

3. ASSIGNMENTS AND REALISATIONS

3.1 The Environmental Enforcement Report

One of the most significant tasks – and accomplishments so far – of the VHRM is the annual publication of the Environmental Enforcement Report. The Environmental Enforcement Decree determined a very clear content for the Environmental Enforcement Report. As a minimum requirement, this report needs to contain:

- A general evaluation of the regional environmental enforcement policy conducted during the past calendar year;
- A specific evaluation of the manner in which the separate enforcement instruments were employed in the task;
- An overview of the cases for which, within the fixed time period, no ruling was rendered vis-à-vis the appeals versus the decisions concerning administrative measures, and an evaluation of the decision-making practices of the public prosecutors' offices regarding whether or not to criminally prosecute an observed environmental violation;
- An overview and a comparison of the environmental enforcement policy conducted by the municipalities and the provinces;
- An inventory of the insights gained in the course of the enforcement period, which may be suitable for future use in improving the environmental regulations, policy visions and policy implementation; and
- Recommendations for the further development of the environmental enforcement policy.²⁵

The Environmental Enforcement Report is a crucial element in shaping the environmental enforcement policy, as well as supporting and, as

²⁵ Decree of 21 December 2007 to complement the Decree of 5 April 1995 concerning general provisions on environmental policy with the title XVI 'Toezicht, handhaving en veiligheidsmaatregelen', *Bel.Gaz.*, 29 February 2008, article 16.2.5.

required, updating it. It is all-encompassing and contains all relevant facts and figures about the environmental enforcement policy conducted during the past calendar year. The Environmental Enforcement Report proffers a concrete idea of the manner in which the environmental enforcement policy is being implemented in the field.²⁶

The Environmental Enforcement Reports are mainly approached in a quantitative manner. Since the number of environmental enforcement actors that need to be surveyed every year is quite substantial – more than 450 respondents²⁷ – this quantitative approach is the most practical solution. For instance, questions are asked concerning the number of appointed supervisors and the number of full-time equivalents that these individuals devote to enforcement tasks. In addition, the supervisors are annually asked about the number of controls executed in the last year and the results thereof (advisories, warnings, reports, reports of determination of the observed facts and administrative measures). By asking for this kind of information the VHRM is able to map the current status of the enforcement landscape within the Flemish Region. This is also the case for the sanctioning aspect. The prosecutors' offices in the Flemish Region are asked every year to provide an overview of their registered environmental cases and any follow-up action.²⁸ The administration within the Flemish Government responsible for the levy of administrative fines, is annually asked to list the kinds of environmental violations found and the number of monetary penalties imposed. Hence, also the sanctioning is analysed in a rather quantitative manner.

One significant effect of the Environmental Enforcement Reports is that the various enforcement actors are – in the framework of the annual survey – encouraged and compelled (some actors have a collaboration obligation) to monitor their own environmental enforcement actions and gather and collect relevant follow-up information. Based on the principle of evidence-based monitoring, targeting the collection of data in itself can already be considered as a great leap forward for the environmental enforcement actors. In the hope of extending the survey and the scope of

²⁶ Explanatory note, Parliamentary papers of the Flemish Parliament, 2006–2007, no 1249/1, pp. 25–26.

²⁷ This large number of respondents is related to the fact that with the new decree of 2009, all municipalities in the Flemish Region (308 in total) also have the obligation to appoint a monitoring agent.

²⁸ Note again that it is remarkable that a Flemish decree can, via the VHRM, ask for the cooperation of public prosecutors, although they formally do not fall directly under the competence of the Flemish Region, but of the Belgian federal authorities.

the Environmental Enforcement Reports in the future, the environmental enforcement actors will be encouraged to monitor even more aspects of their own performances.

The environmental reports not only deliver advantages for the environmental enforcement actors, the reports also form an important reference for the policy-makers. Given the volume of information that is annually gathered and analysed, problem areas in the environmental enforcement policy are being detected and identified. Moreover, the reports already give evidence of the success of the Environmental Enforcement Decree. The Environmental Enforcement Report has turned into a significant instrument to follow up the implementation of the environmental enforcement policy, to evaluate it more thoroughly and to create transparency between the environmental enforcement actors reciprocally and between the environmental enforcement actors and the policy-makers.²⁹

Because the Environmental Enforcement Report is published every year, it is possible to compare the evolution of environmental enforcement based on the data gathered in previous reports. So far, the VHRM has published five environmental enforcement reports, covering the period 2009–2013.³⁰ Since the Environmental Enforcement Decree has already been in force for five years and the Environmental Enforcement Report 2013 is the fifth report of its kind, this report forms an overview report regarding five years' environmental enforcement in the Flanders Region.

The strength of those environmental enforcement reports is that they, on a yearly basis, and based on a good response by the stakeholders involved, provide relevant data, for example on the number of violations, but also the consequences following those violations. Since those data are now available for five years, some trends can be discovered which may show *inter alia* in which areas greater or fewer violations would be detected. Moreover, the reports, for example, also make clear in which districts public prosecutors either prosecute many cases or forward them to the administrative authority for administrative fining, and in which districts prosecutors still dismiss (too) many cases. Collecting this type of

²⁹ As an example of the transparency of data, a reference to the Environmental Enforcement Reports of the Flemish High Council of Environmental Enforcement was made during the workshop 'Towards an Upgraded EU Legal Framework on Environmental Inspections and Surveillance' of the European Commission, Directorate-General Environment (20 September 2013).

³⁰ The Environmental Enforcement Reports are all translated into English and can be found on the website of the VHRM: <http://www.vhrm.be/documenten/milieuhandhavingssrapport>

information is hence an important first step towards an evidence-based monitoring and enforcement system. There are, however, undoubtedly also limitations. One problem is underreporting; another issue is that not every authority may interpret the questions in the same manner, which in some cases provides some bias in the data. Another issue is that in this first phase the environmental reports have largely relied upon collection of data and an attempt to interpret those data. However, important data are still lacking. For example, the reports so far could provide information on the number of cases where, for instance, administrative fining, dismissals or criminal prosecution took place. Information on the actual sanctions (for example, the amount of the fine) has not yet been included in the environmental reports. It is, however, the intention to also collect this information in the future. Moreover, an inherent limitation of such a quantitative approach is that merely focusing on numbers will provide some information on the enforcement activity, but not necessarily on the outcome of enforcement actions, for example as far as improvement of environmental quality is concerned. The latter should ultimately of course be the goal of any enforcement action. The numbers alone do obviously not provide detailed information on the quality of the enforcement actions. At this stage, it is also difficult to proceed towards such a qualitative approach. That could be done, for example, through a case method, but the disadvantage of that would be that it would unavoidably create a selection bias. However, given the mere quantitative nature of the reporting, the reports also warn that it would be wrong to draw normative or policy conclusions merely based on the numbers. The numbers are a starting point; the different stakeholders can often provide the story behind the numbers, which can better indicate, for instance, how a particular trend in specific numbers should be interpreted as far as the quality of the enforcement efforts is concerned.

3.2 The Environmental Enforcement Programme

An initial task of the VHRM was the annual publication of an Environmental Enforcement Programme which formulated the priorities for the coming calendar year of the environmental enforcement policy. This programme contained recommendations on environmental enforcement at the provincial and municipal levels, as well as on cooperation with and amongst actors at these policy levels. A restriction of this annual programme was that no directives or instructions could be directed to the environmental enforcement actors, which means no common enforcement plan could be drafted for (a segment of) the

enforcement actors.³¹ However, the coordinating role of the VHRM was fulfilled by working within the total compass of the combined programmes of the various enforcement entities, to recognise, thus, the overlaps and the lacunae existing within these separate programmes.³² The VHRM published an annual environmental enforcement programme for 2010 and 2011. A crucial element in this approach was the need for existing and detailed programmes for the various enforcement actors. A purposeful enforcement policy will lead to greater compliance with the regulations than would be the case with random inspections. Given the limited resources at hand and the impossibility of regularly inspecting all systems within the available time span, it may be opportune to work out the enforcement in an organised and specifically formulated manner (for example, by assigning priorities).³³

After publishing the two enforcement programmes it became clear that not every enforcement actor had its own programme and those who have them don't formulate such programmes in a comparable way. Hence, one of the most important challenges for the VHRM was to convince the various environmental enforcement actors of the need for and the benefits of proper planning. This is not only crucial for the environmental enforcement within the Flemish Region in general – given the significance of programmed supervision – but it also serves to enhance the quality of the enforcement programmes rather than proceeding purely descriptively and collectively. Moreover, the need for multi-annual programming for the VHRM, as well as for the individual environmental enforcement actor – in contrast to annual programming – emerged. It became clear that the priorities in the environmental enforcement actions didn't change annually. A broader time span is necessary to implement an environmental enforcement programme. The policy-makers in the Flemish Region followed the VHRM in the idea that an environmental enforcement programme should be multi-annual and that the different environmental actors should each draft their own multi-annual programme before the VHRM publishes a strategic overarching programme. The Environmental Enforcement Decree was accordingly adapted in 2013 and now states that the VHRM coordinates

³¹ Explanatory note, Parliamentary papers of the Flemish Parliament, 2006–2007, no 1249/1, p. 25.

³² Environmental Enforcement Programme 2010, Flemish High Council of Environmental Enforcement, p. 25.

³³ Billiet, C.M. and Rousseau, S., 'Zachte rechtshandhaving in het bestuurlijke handhavingsspoor: de inspectiebeslissing en het voortraject van bestuurlijke sancties. Een rechtseconomische analyse', *Tijdschrift voor Milieurecht*, 2005, p. 19.

a strategic five-year environmental enforcement programme which contains the enforcement priorities of the enforcement agencies. Therefore, enforcement agencies need to draft individual five-year enforcement programmes. The strategic five-year environmental enforcement programme should include, at least:

- Enforcement priorities of the environmental enforcement actors, coordinated by the VHRM;
- Overarching recommendations of the VHRM with regard to the strategic and operational objectives of regional, provincial and municipal environmental enforcement;
- Strategic and operational objectives with regard to the tasks and activities of the VHRM.

The scope of this strategic environmental enforcement programme is broader than the annual programme. The policy-makers felt it was important that the programme of the VHRM is more than just a collection of programmes of the environmental enforcement actors.

Coordinating a strategic environmental enforcement programme is still quite a challenge. One problem is, as already indicated above, the important difference between the various stakeholders, especially at a level of monitoring and enforcement. One can obviously expect some of the larger regional stakeholders, such as the environmental inspectorate, to draft an environmental enforcement action programme (which they *de facto* already do). However, the question arises whether it is equally useful to ask for such programming from the hundreds of local communities which formally also have enforcement powers, but who in some cases merely have one official who is (and in some cases even only part-time) occupied with enforcement actions. Moreover, the real expertise, for example in knowing where enforcement actions would be needed in a coming period, is of course primarily present within the stakeholders themselves. The VHRM, where all those stakeholders are represented, can at best compare the efforts and plans of the different stakeholders and try to identify gaps or overlaps, for example. However, in that respect, the VHRM also has to take into account that it has no hierarchical competence to direct particular stakeholders regarding what type of enforcement actions to undertake, for example. The drafting of such a strategic environmental enforcement programme hence remains a careful balancing exercise.

The VHRM started the draft of the strategic environmental enforcement programme with the determination of priorities through *inter alia*

a consultation of the environmental enforcement actors.³⁴ The goal is to publish the first five-year environmental programme after the analysis of the individual programmes of the environmental actors, the determinations of the priorities and the set-up of mutual recommendations for implementation, actions and partnerships.

3.3 Protocols

The Environmental Enforcement Decree defines that within the context of the VHRM 'environmental enforcement protocols' can be drafted. These protocols are designed to give further substantive content to the environmental enforcement policy³⁵ and need to ensure clear agreements about the operating field. The various supervising entities have not only complementary competences and assignments, but sometimes also those that are overlapping.³⁶ The protocols can contain a territorial demarcation but also a demarcation of content, this is in order that certain determining factors in the activity are controlled. In addition, a protocol is meant to make optimal use of the means and resources at the disposal of the environmental enforcement actors and to ensure harmonisation amongst them.³⁷

From a legal point of view an environmental enforcement protocol is not a formal contract; even though such a protocol will be set out in writing, it may be assumed that the involved actors will voluntarily abide by its provisions ('gentlemen's agreements'). Nonetheless, it is not an easy task for the enforcement actors to harmonise the practice of their own competences with other actors with identical competences, nor is it self-evident to other actors that have been appointed as supervisors to implement the assignments entrusted to them. The aim is that such agreements should be broad in scope and should be formed by common consent and

³⁴ Stahl, M., 'Doing what's important: setting priorities for environmental compliance and enforcement programs'. In: Paddock, L., Qun, D., Kotzé, L.J., Markell, D.L., Markowitz, K.J. and Zaelke, D., *Compliance and Enforcement in Environmental Law – Toward More Effective Implementation*, 2011, Edward Elgar, p.161.

³⁵ Geysels, F., Meeus, R., Vanheule, J. and Hoebe, J., *Handhavingszakboekje Milieu 2009*, p.49.

³⁶ However, it appears from the parliamentary preliminary work that it was actually meant to avoid an overlap of the competences (Explanatory note, Parliamentary papers of the Flemish Parliament, 2006–2007, no 1249/1, p.31). There remain, however, different supervisors competent for certain regulations, e.g., Environmental Permits Decree.

³⁷ Explanatory note, Parliamentary papers of the Flemish Parliament, 2006–2007, no 1249/1, p.28.

consensus. This requires a great deal of prior research, consultation, and an indisputable willingness for collaboration.

In 2013 the first environmental enforcement protocol, facilitated by the VHRM, was signed by the Flemish Minister for the Environment and the Federal Minister for Justice. This protocol is called the 'Priority note prosecution policy environmental law in the Flemish Region'³⁸ and forms an agreement between the supervisors and the prosecutors. It determines the priorities with regard to the supervision of certain (types of) environmental crimes and with regard to the criminal prosecution of these crimes. The protocol also contains formal agreements concerning information exchange. The implementation of the protocol will be followed up and evaluated in the Environmental Enforcement Reports.

3.4 Additional Achievements

As a network, the VHRM also has other functions and responsibilities besides the publication of the Environmental Enforcement Report, the publication of the multi-annual environmental enforcement programme, and the facilitation of protocols. During the first five years the VHRM has tried to become a fixed value in supporting and engaging the environmental enforcement actors through *inter alia*:

- *The organisation of consultation and deliberation*: The VHRM forms an institutionalised network that gives the environmental enforcement actors a forum to cooperate and to discuss mutual challenges.
- *The organisation of workshops*: The VHRM has organised a large number of workshops for the members of the VHRM and the members of the working groups, for example concerning the use of databases, enforceability of regulations and the use of enforcement instruments.
- *The organisation of conferences*: The VHRM organises annually a conference in which a specific topic is discussed by academics and practitioners, for example concerning targeted surveillance, local environmental enforcement and environmental enforcement networks.
- *The formulation of policy advice*: The VHRM not only has a role as policy evaluator, but also as 'policy preparer'. The VHRM regularly formulates policy advice for the Flemish Minister for the Environment concerning specific aspects of the environmental enforcement landscape, for example concerning the local environmental enforcement and the environmental enforcement regulation.

³⁸ <http://www.vhrm.be/english/20130930-priority-note.pdf>

- *Connections with other environmental enforcement networks:* The VHRM has made – very rapidly during the time of its existence – connections with other networks such as the International Network for Environmental Compliance and Enforcement (INECE) and the European Union Network for the Implementation and Enforcement of Environmental Law (IMPEL). Participation in international fora can yield useful information. Since various environmental problems cross national boundaries and because of the increasing importance of international environmental policy and European regulations, the usefulness and necessity of international cooperation is beyond dispute. Moreover, these contacts provide a cross-fertilisation of knowledge and experience.
- *The creation of practical tools:* The VHRM developed sample form letters, templates and a glossary in the service of a smoother and more uniform information exchange.

4. AN EVALUATION OF THE NETWORK: SUCCESS FACTORS AND CHALLENGES

The VHRM has been active in the Flemish environmental enforcement landscape for the past five years. As a network, it combines all the environmental enforcement actors active in the Flemish Regions. The VHRM tries to support and engage these actors in working together to make environmental enforcement more effective and more efficient. From its inception the VHRM has benefitted from a few strong features. These particularly relate to its statutory basis (based on a decree) and the fact that it has independent financing and a permanent secretariat. This means that the members can concentrate on executing the tasks of the VHRM and on the networking and do not have to worry about fundraising, for example. These features certainly contribute to the success of the network. The VHRM has used and will use these assets and opportunities for the benefit of environmental enforcement in the Flemish Region. On the other hand, during the past five years it became clear that there are still some challenges to overcome. When assessing the VHRM as an environmental enforcement network – following Pink and Lehane's network evaluation matrix³⁹ – five major themes can be used as core evaluation criteria:

³⁹ Pink, G. and Lehane, J., 'Environmental enforcement networks: development of a network evaluation matrix'. In: INECE, 9th International Conference on Environmental Compliance and Enforcement, Proceedings, 2011, pp. 805–821.

- *Members*: The VHRM consists of individual members who represent an environmental enforcement agency. The members are appointed by the Flemish Government for a period of five years. As stated before, this obligatory membership has advantages and disadvantages. On the one hand, the core environmental enforcement agencies are, in any case, represented through their appointed membership. Since the VHRM makes decisions by consensus, the decisions are supported by all the environmental enforcement actors. On the other hand, an obligatory membership may cause some members not to feel like a voluntary part of a network, and so see the network as a threat rather than an opportunity. The value of the network for its members varies from member to member and the way that they experience their membership (threat vs. advantage).
- *Finances*: The VHRM can count on a permanent secretariat, which is responsible for the substantive and administrative support, and receives an annual fixed budget. The VHRM does not depend on its members for financial support (this may also explain why some members don't feel related to the network as they don't have a financial responsibility and a sense of reciprocity towards the network). The annual budget gives the VHRM the possibility of organising meetings, workshops and conferences for its members, to set-up projects and to outsource studies.
- *Governance*: The structure and main tasks of the VHRM are determined in the Environmental Enforcement Decree. The VHRM formalised a document with internal regulations which was ratified by the Flemish Government and *inter alia* defines the roles of the chairman, the vice-chairman, the permanent secretary and the members. It also includes written procedures for the course of the meetings. In its Strategic and Operational Programme, the VHRM determined the mission, the vision and the strategic and operational goals of the network. The VHRM maintains an open communication for members and non-members. Most documents are published on the website of the network, such as the environmental reports, protocols, internal regulations, templates, policy guidance, glossary, presentations, etc. The proceedings of the meetings are continuously available for the members to consult. A passive communication concerning the proceedings, which means 'on the basis of an explicit request', is used towards the non-member. The communication with the members is centralised by the permanent secretariat, which is the primary point of contact. The communication procedures are determined in a communication plan.

- *Support*: In the past years the number of interested individuals has increased, but the support the network receives varies from member to member. Some members 'use' the network to their benefit and support the network to gain even more benefits. Other members do not support the network because they consider their membership as a vehicle to counter possible interference from other environmental actors. On the other hand, the VHRM has forged liaisons with other networks, such as INECE and IMPEL, and takes part in activities organised by other networks.
- *Deliverables*: As described above, the VHRM already has some tangible benefits for members, such as the annual environmental enforcement reports and the annual conferences. In the past five years the VHRM has also produced templates and a glossary, organised meetings and workshops, and facilitated the realisation of the first environmental enforcement protocol. Also, the VHRM has made efforts to make itself known to all the environmental enforcement actors within the Flemish Region by organising surveys, offering an internet forum through the use of social media, answering questions from supervisors, giving lectures and presentations, etc.

For some criteria, such as finance, governance and tangible deliverables, the VHRM can be evaluated as a maturing or well-established network within the Flemish environmental enforcement landscape. An annual budget and a permanent secretariat can certainly be considered as success factors. For other criteria, such as membership and support, the VHRM is still emerging or fragile. Concerning the known challenges, the VHRM has to make an effort in the future to overcome these shortcomings.

5. CONCLUDING REMARKS

The VHRM is an interesting network that was created in a very particular institutional environment in the Flemish Region. The VHRM shows some of the complexities of environmental enforcement in a federal state. As a result, the VHRM has members from regional authorities, but equally from authorities that formally fall under the federal level. Moreover, the new Environmental Enforcement Decree of 2009 created an administrative enforcement and fining system in addition to the criminal enforcement. That thus necessitates some collaboration between these two different mechanisms. All those actors and stakeholders from the different enforcement levels are brought together or at least represented within the VHRM. That is at the same time the strength as well as the weakness of

this VHRM. The advantage is that it provides a formal (since it is backed by a decree) institutional basis for collaboration and networking between a large variety of actors. Whenever particular issues arise that have to be settled in order to increase the effectiveness of environmental enforcement, the issue can immediately be put on the agenda of either a working group or the plenary meeting. At the same time, this very broad composition of the VHRM also implies that the VHRM has some members with a high degree of specialisation and technical knowledge (focusing, for example, on hazardous waste or the petrochemical industry) whereas others (such as representatives of the local police authorities) will handle environmental complaints in addition to all kind of other complaints of a totally different nature. These totally different backgrounds make collaboration and cooperation an interesting challenge.

The VHRM has functioned now for five years and its most important function probably has been simply to provide a forum for all stakeholders to meet, discuss, and solve issues and tensions. To a large extent, that is precisely what the plenary meetings and working groups are about. In addition, the VHRM has enabled a collection of data published in the environmental enforcement reports. Even though this data collection can undoubtedly still be improved, this is an important step in the process towards an optimal enforcement strategy. If scarce enforcement resources are to be used in an efficient manner, an important first step is that information needs to be collected on simple issues such as violations, remedies and consequences. It is only after a careful evaluation of those data that an evidence-based enforcement policy, targeting monitoring on those sectors where violations are most likely to occur, can be developed. The data collection is therefore obviously not a goal in itself, but a means to improve the quality of the environmental law enforcement.

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